Supreme Court, U. S.
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No. 80-967

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

HOSPITAL AND INSTITUTIONAL WORKERS UNION, LOCAL 250,
Petitioner,

VS.

PASATIEMPO DEVELOPMENT CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LITTLER, MENDELSON, FASTIFF & TICHY
A PROFESSIONAL CORPORATION
J. RICHARD THESING
550 Hamilton Avenue, Suite 120
Palo Alto, California 94301
Telephone: (415) 326-5732
Attorneys for Respondent

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

STATEMENT OF THE QUESTIONS PRESENTED

Was the trier of fact's decision that the Respondent had not agreed to arbitrate disputes arising in the hiatus between Respondent's predecessor's last contract with the Petitioner and Respondent's first contract with the Petitioner clearly erroneous?

May arbitration be compelled where it is conceded that there has never been any agreement between a successor employer and union to arbitrate disputes, and the arbitration provision in the predecessor's contract has expired by its terms?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Prior to Pasatiempo Development Corporation's ("Pasatiempo's") purchase of Pine Towers Convalescent Hospital on November 1, 1976, the facility had been owned by Western States Convalescent Hospitals. Western States' contract with Hospital and Institutional Workers Union, Local 250 (hereinafter the "Union" or "Petitioner"), the representative of the Hospital's employees, had expired by its terms on July 1, 1976. An oral extension of the last expired agreement was agreed to by Western States; the

*Pasatiempo Development Corporation has been merged into National Medical Enterprises, Inc.

extension was to expire upon the sale of the facility.[1] Negotiations for an initial collective bargaining agreement between Pasatiempo and the Union did not commence until late November, 1976, and did not result in an executed agreement until June 1, 1977. The June Agreement was retroactive only to February 1, 1977. Thus, there was a three month hiatus between the termination of Western States' last agreement with the Union and Pasatiempo's first Agreement with the Union.[2]

In the hiatus between the expiration of Western States' last expired agreement and Pasatiempo's first Agreement, the existing terms and conditions of employment were continued unchanged. Shortly after Pasatiempo's acquisition of the facility, its labor relations counsel, J. Richard Thesing, had stated that Pasatiempo would "not make any changes in the wages or benefits as we were required to do so as the successor, unless we first negotiated about them." Accordingly, no wage increases were extended to the employees, and no dues were checked off from the wages of the Hospital's employees until the new Agreement's term commenced.[3]

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[1]Western States continued to operate other convalescent hospitals under contracts with Petitioner after the sale of the Pine Tower's facility to Pasatiempo.

[2]The agreement ultimately concluded by Pasatiempo materially altered the procedure by which grievances were to be reviewed and either resolved or referred to arbitration. The changes were necessitated by substantial differences between Pasatiempo's management structure and the organization of Western States' operations.

[3]The proof offered in support of the Union's contention that dues had been "checked-off" in the hiatus was rejected as inherently suspect by the District Court.

In the period of time between the two contracts, Sadie Herndon, an employee of the Hospital, was discharged. A series of grievance meetings then ensued, but were unsuccessful in resolving the dispute concerning the propriety of Ms. Herndon's discharge. The Union then demanded arbitration of Ms. Herndon's grievance. In reply, Mr. Thesing requested by letter that Mr. Dixon, a union representative, have the Union's counsel contact him with respect to pursuit of the arbitration. At trial, Mr. Thesing testified that he had indicated to Mr. Dixon immediately after transmittal of the letter that Pasatiempo would decline to arbitrate the grievance as there was no contract in effect, and that the letter was intended to establish contact with counsel for the Union to explain Pasatiempo's position. The record indicates no attempt on the Union's behalf to pursue the arbitration between receipt of the letter and Mr. Thesing's subsequent conversation with Mr. Dixon.

Local 250 then filed a petition to compel arbitration in a California state court which was removed to District Court by Pasatiempo. Local 250 moved to compel arbitration in Federal Court on the basis that Pasatiempo had voluntarily assumed the entirety of Western States' contract until it negotiated a further agreement. Due to a dispute as to what was said in an initial meeting between Mr. Thesing and a Union representative, the matter was set for trial. The District Court concluded that since no specific understanding to arbitrate disputes in the hiatus had been reached between Mr. Thesing and the Local 250 business representative, Pasatiempo would not be compelled to arbitrate the discharge case.

Subsequently, the Court of Appeals issued a *per curiam* affirmation of the trial court's decision. The Court of Appeals found the trial judge's resolution of the factual issue posed to be not clearly erroneous, and found that Pasatiempo had no federal common law obligation to arbitrate disputes under the expired Western States' agreement.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The question framed by the Petitioner sweeps before it every aspect of the case. Petitioner's statement of the case dwells unnecessarily upon the disputed factual record reviewed and resolved by the lower courts. The Union's Petition clearly invites the reevaluation of the disputed factual issues heard below. Indeed, Petitioner vacillates between conceding that factual discrepancies in the record need not be resolved by this Court, and arguing on the premise that they have been resolved in Petitioner's favor. (See, Petition For Writ of Certiorari at p. 2, n. 1, and p. 4, ll. 26, 27.) The appraisal of whether the trial court's decision was or was not clearly erroneous is not a function of this Court, and is not a basis upon which to grant a Writ of Certiorari.

2. In the instant case, the Union infers that there is a duty to arbitrate on the premise that arbitration is a term or condition of employment which a successor such as Pasatiempo must abide by, and argues that there is a common law duty for a successor to arbitrate under the provisions of its predecessor's contract. Neither the inference nor the argument raised by the Union present questions

appropriate for resolution by this Court, as they are easily and consistently resolved within existing authority.

The Union infers that Pasatiempo, having promised as a successor to make no changes in the existing terms and conditions of employment, is obligated to continue to arbitrate grievances. (See, Petition for Writ of Certiorari, p. 5, 11. 1-4.) However, arbitration has never been considered a term or condition of employment which an employer must maintain until it bargains in good faith to continue or to modify the obligation. *The Hilton-Davis Chemical Company,* 185 N.L.R.B. 241, 242 (1970). Contrary to Petitioner's contention, *American Sink Top & Cabinet Co., Inc.,* 242 N.L.R.B. No. 53 (1979) did not render the duty to arbitrate a term or condition of employment. In *American Sink Top, supra,* the NLRB merely applied the result reached in *Nolde Brothers, Inc. v. Local 358 Bakery and Confectionery Workers Union,* 430 U.S. 243 (1977)—that a post expiration duty to arbitrate may bind the *parties* to an expired agreement where the parties' contractual commitment to arbitrate disputes arising under the agreement was not limited in time. As recognized below by the Court of Appeals, Pasatiempo has no obligation to arbitrate as a derivative of its obligation to bargain in good faith. The asserted tension between the NLRB's decisions and the Court of Appeals' decision simply does not exist.

Petitioner seeks the attention of this Court for the assertion that Pasatiempo had a federal common law duty to arbitrate by overstating the issue presented. As noted by the Court below, the issue is appropriately confined to whether Pasatiempo had a duty to arbitrate after the only

arguably extant agreement to arbitrate had expired.[4] In seeking a footing for its Petition by attempting to present a conflict among decisions of the Court of Appeals, Petitioner has relied upon cases which consider a successor's duty to arbitrate when it assumes a business in mid-contract.[5] The decision below cannot be considered to be

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[4]Contrary to Petitioner's assertions, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), cannot teach that a successor which purchases a business in mid-contract is obligated to arbitrate disputes with an employee-representative after the decision in *NLRB v. Burns International Security Service, Inc.*, 406 U.S. 272 (1972). Such an asserted obligation to arbitrate is fundamentally inconsistent with the right granted successors under *Burns* to unilaterally change the existing terms and conditions of employment. The contract-based duty to arbitrate which was found in *Wiley* is no more than a derivative of the statutory obligation to bargain in good faith which was considered in *Burns*. Thus, the limitations *Burns* placed on the duty to bargain in good faith must be considered to have undone the result needed in *Wiley*. Furthermore, while the result reached in *Wiley* may be appropriate where one employer disappears by way of merger into a second, the latter of which is required by state law to assume the former's obligations, it is not appropriate here, after the sale of only a portion of the predecessor's assets.

[5]*See*, Petition for Writ of Certiorari at p. 7, ll. 8-20: *General Teamsters Local No. 249 v. Bill's Trucking, Inc.*, 493 F.2d 956 (3d Cir. 1974); *United Steelworkers v. United States Gypsum Co.*, 492 F.2d 713 (5th Cir. 1974); *United Steelworkers v. Reliance Universal, Inc.*, 335 F.2d 891 (3d Cir. 1964); *Wackenhut Corp. v. Guard Workers Union*, 332 F.2d 954 (9th Cir. 1964); and *Local 115 Joint Board v. B & K Investments*, 436 F.Supp. 1203 (S.D. Fla. 1977); all entailed enforcement of an arbitration provision against a successor which had purchased a business in mid-contract. The remaining cases cited by Petitioner either did not entail a successor relationship, *e.g.*, *Washington Baltimore Newspaper Guild v. Washington Post*, 442 F.Supp. 1060 (D.D.C. 1977), or were resolved by the determination that the party against whom arbitra-

inconsistent with cases which do not address the issue presented.

Moreover, the cases advanced by Petitioner to support the assertion that arbitration would be appropriate predate this Court's decision in *Nolde Brothers, Inc. v. Local 358 Bakery and Confectionery Workers Union, supra*, which must be considered to conclusively resolve the question advanced herein. *Nolde Brothers* held that an employer need only arbitrate a post-contract-termination dispute with a representative of its employees when the expired contract contains a broad arbitration provision, and there is an assumption that the parties to the expired contract will continue to utilize their prior grievance and arbitration procedures. Neither of those factors exist here.

No matter how broad the expired Western States' agreement arbitration provision was, it lacked an essential element necessary to the post-termination arbitration sought here: Pasatiempo is not a party to the agreement. Absent Pasatiempo's consent to the provision, which the Union cannot contest here, Pasatiempo cannot be considered bound by it.

The assumption that the parties' preference for arbitration would remain unchanged is unwarranted here. Western States' sale of the facility introduced a stranger to the Hospital's relationship with its employees, a stranger to whom no presumption drawn from a past course of conduct can apply. Pasatiempo declined to assume the expired Western States' agreement and the arbitration commitment

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tion had been sought had actually agreed to arbitrate such disputes, *e.g., Newspaper Guild v. Central States Publishing Co.*, 451 F.Supp. 1112 (E.D. Pa. 1979).

contained therein; Pasatiempo expressly limited its undertaking to making no changes in established terms and conditions of employment. The arbitration provision which Pasatiempo ultimately negotiated with the Union differed substantially from that under the Western States agreement. Hence, no presumption of continued acquiescence in Western States' arbitration agreement can be inferred.

CONCLUSION

The disjuncture effectuated by the expiration of the only arguably pertinent agreement to arbitrate labor disputes, and the pursuit of the obligation against a stranger to the expired arbitration agreement, must be considered to preclude the relief sought by the Petitioner. *Cf. NLRB v. Burns International Security Service, Inc., supra; Nolde Brothers, Inc. v. Local 358 Bakery and Confectionery Workers Union, supra.*

For the reasons suggested above, the Petition for Writ of Certiorari should be denied.

Dated: January 5, 1981

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF & TICHY
A PROFESSIONAL CORPORATION

J. RICHARD THESING
Attorneys for Respondent